

# JUVENILE DETENTION: RIGHT AND ADEQUACY OF TREATMENT ISSUES

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EDITOR'S NOTE: *In the interest of conserving space, all substantive footnotes have been deleted from this article. Copies of the footnotes and the complete reference list can be obtained by writing LAW AND SOCIETY REVIEW, Department of Political Science, University of Minnesota, Minneapolis, Minnesota 55455.*

## INTRODUCTION

Among the multiple issues raised dealing with the future of the juvenile process, legal issues appear to predominate. These issues have taken on new momentum since the *Gault* case, but have become of increasing concern for at least the last decade (*In re Gault*, 1967).<sup>1</sup> Such issues as a timely notice for a hearing, content of such notices, the vagueness and indefiniteness of statutes pertaining to pleadings, right to counsel, right to confrontation of witnesses, and the privilege against self-incrimination have been guaranteed to juveniles under due process. In connection with the question of this paper, it should be noted that *Gault* applied only to proceedings in which the determination of delinquency could result in a commitment to an institution in which the freedom of the juvenile would thus be curtailed. Additional legal issues can be raised as well, focused on the various stages of apprehension, intake, adjudication, and sentencing. Such matters in the juvenile process as discovery, right to a speedy trial, public proceedings, jury trial, and change of venue, are some related due process issues which still remain basically unsettled in different jurisdictions.

Even if these legal requirements from the adult criminal process are met and further extended to juveniles, ultimate issues of the juvenile rehabilitation process are not resolved. Despite the sharp attack on the juvenile process, few critics wish to revert to pre-20th century approaches of failing to make a distinction between juvenile and adult offenders in court. A system of juvenile justice must ultimately hinge on the quality of its institutions and personnel at all levels from intake to confinement. Preoccupation with details of due process, important as these details may be for individual juveniles caught up in what can become a legal maze, may have little influence on what subsequently happens to the juvenile once these criteria

are met. Due process at the trial level does not affect the process for those adjudicated "delinquent," but only shifts the focus of attention from what may be the primary, if only, justification for separate handling of juveniles. Historically, separate handling was not a regard for youth *per se*, but rather a pragmatic effort to shift the aims of the traditional criminal law from retribution, punishment, and deterrence, to a genuine effort at rehabilitation which was at best given lip service in adult penal settings. In that sense, the last sixty years can be regarded as a prolonged pilot study of this pragmatic experiment. During this pilot period juveniles were supposed to be treated differently than adult offenders; different goals were to be used for juveniles as well.

Maintenance of separate procedures for handling juveniles is not in itself under scrutiny here. Rather, appraisal of certain misguided products of these procedures is seen as necessary. This results in the juvenile offender getting the worst of two approaches to deviant behavior by being viewed as sick and bad. Differences in dispositional alternatives will remain the significant difference between adults and juveniles *once* the juvenile is found delinquent within expanding procedural safeguards. This provides a background for the thesis of this paper: that the accomplishment of legal safe-guards for juveniles at the trial level will still leave vast numbers who are remanded to various institutions for confinement. Those remanded are not considered punished, nor is the setting referred to as prison. The issues of what happens to the juvenile once involuntarily confined, and his rights at that terminal stage of the legal proceedings, remain as the ultimate test for what type of demands the special handling of juveniles entail. Confinement raises the following questions about juvenile rehabilitation: (1) *Can* a given juvenile delinquent be rehabilitated? (2) What *measures* are used to effect this? (3) Is there a "right to treatment" for the juvenile in such situations? (4) Are there any *standards* or criteria for appraising the "adequacy" of what is done in the name of treatment in such correctional settings?

### **Legal Basis for Detention**

Detention of juveniles is based on the theoretical presumption that they can be rehabilitated. The right of the state on constitutional grounds to supersede the parents for this purpose has long been established (Indiana Law Journal, 1969). Hence, the sacrifice of not only certain procedural safeguards, but the

permissibility for generalized grouping of offenders as “delinquent” on the basis of widely varying behaviors. Not only are some of these behaviors not acts which would be considered criminal, but one result has been that individuals adjudicated under such rubrics as incorrigibility at times are sent to the same institutions as those who were assaultive and homicidal — all for the stated purpose of rehabilitation. Assignment of delinquency status to someone on the basis of their being ungovernable by their parents, in contrast to situations where overt offenses have been committed, comes close to making some juvenile offenses a status crime similar to vagrancy. The social stigma of delinquency is attached to all so categorized in terms of their future, although it is highly questionable whether the stigmatization has any negative impact from their peer group; in some cultural settings, the delinquency appellation may have the opposite effect. However, the adverse consequences of the labeling extend beyond the immediate response of the peer group. Categorization of a juvenile as delinquent does not disappear from official scrutiny nor do the records actually remain private as supposedly guaranteed.<sup>2</sup>

The basis for juvenile detention lies in the position that the procedure is a civil one. While this sacrifices the safeguards present in criminal procedures, it is hoped that it will remove the punitive emphasis as well, so that if commitment to a detention facility was deemed necessary, it would not be a *de facto* punitive measure. These ambiguities have in practice rarely been resolved, since distinctions between treatment and punishment for juveniles caught up in these niceties have not been realistic — at least from the point of the cognitive and affective perspective of the contemporary adolescent. Detention against one’s wishes in a semi-total institution for unwanted treatment violates many of the essentials viewed as necessary for any mutually contractual arrangement. There is the double-bind situation present in which something both “is” and “is not” at the same time. The juvenile is told that he is committed in a civil procedure and not a criminal one, that he is a delinquent and not a criminal, that he is being detained for his own best interests and not those of others, and that he is being rehabilitated and not punished. All of these are not only evasive, but untrue to a great extent.

The greatest extremes in the handling of juveniles are seen when the English and Scandinavian approaches are contrasted. While the English juvenile courts are courts of law

with established rules of evidence and procedure and have been described as "modified criminal courts," the Scandinavian Child Welfare Councils are administrative tribunals and not bound by rules of law and evidence. Many historical and cultural factors have contributed to this difference, in contrast to the ambivalent American approach which attempts to be both simultaneously, without ever adopting either. The conservatism of the English approach to delinquent minors can be seen at the end of the eighteenth century when Blackstone observed that the criminal law relating to minors had not changed for 400 years (Prevezer, 1967).<sup>3</sup> Since prison confinement had not yet developed, felonies were punished by death or transportation and misdemeanors by whipping, boarding, mutilating, or exposure in the stocks. The nineteenth century saw the shift to imprisonment in England with minors being incarcerated with the multitude of adult offenders and deviants. This is the background for the disposing of juvenile deviants from which a reforming zeal arose to rehabilitate juvenile offenders rather than punish them. It led to the juvenile court movement in England and the United States by the turn of the century and only gradually to a reconsideration of what the rehabilitation measures and institutions to handle juveniles were accomplishing and how in practice they were functioning.

Treatment facilities for delinquents have had a difficult time ridding themselves of a penal cast. Despite the devoted efforts of some staff members at correctional facilities for juveniles, one cannot abandon the "anatomical" penal characteristics in many of them, even when individual staffs may be making valiant efforts to treat to the best of their ability and with meager resources. In some cases the facilities are not even geographically independent of adult prisons.<sup>4</sup> The facilities for juveniles may be old jails or their equivalent. In some jurisdictions juveniles may be held in solitary confinement before a hearing and the recalcitrant confined in cells without beds from two to five days (Georgetown Law Review, 1960). There is the further questionable practice of transferring juveniles from juvenile facilities to penal institutions without an intermediary court hearing. Such a procedure would seem impossible to justify by any therapeutic criteria. These juvenile cases are equivalent to cases of adults committed under special statutes to mental hospitals as "psychopaths" or sexual offenders who are then transferred to a penitentiary after refusing to admit their wayward behavior. Part of the rationale for this

is that they are deemed in need of being made more amenable to accept the rejected treatment offered in the hospital.<sup>5</sup> The constitutionality of such transfers remains unsolved. From a treatment vantage point such ambivalence need not be present, and the blatant anti-therapeutic nature of the procedures should be pointed out. If they wish to be justified on some other ground, this should be done.

### Juvenile Waiver Issues

Although the focus is here on the situation of the juvenile once committed, the question of "remand" or "waiver" to an adult criminal court is important in this respect since it directly raises issues relevant to treatability. If waiver is carried out, and the juvenile convicted, it results in the juvenile being handled and detained like any adult in a penal institution. Even in jurisdictions where counsel may be appointed on request, there is rarely a provision to inform the juvenile of this right to counsel, to resist a waiver motion. This is a persistence of the lingering attitude that presence of counsel impedes the reformatory process even when the result may be incarceration in an adult prison. More realistically, it conceals the abandonment of any therapeutic goal with a certain class of juvenile offenders. It would seem axiomatic that a juvenile would require counsel in such situations since no pretense of juvenile rehabilitation is *de facto* being made if the motion is carried.

Waiver is an interesting social phenomenon in its own right. Granting of waiver by a judge is subject to all of the social and political vagaries of the moment. The question may at least be raised if a juvenile is to be rehabilitated: On what basis is he being "sent up"? The question of his treatability may not be determinable. In practice, waiver revolves around interpretation of such phrases as "the juvenile having exhausted the treatment facilities available to juveniles," or "if he is considered treatable." A hearing on the waiver motion may involve argument or testimony on these matters in which correctional personnel, or other people involved from clinics or agencies, may be brought in to testify pro or con. The hearing may take on the atmosphere of custody hearings in which the two sides basically state their pro or con positions as to whether a given juvenile is treatable in existent juvenile facilities. There is an unfortunate dearth of reasoning in terms of why and how a given juvenile can be treated and rather a predominance of opinions. When demonstrations for the feasi-

bility of treatment are called for, the evidence may be in the nature of the offender never having been committed to an institution before or that a given institution feels itself equipped to handle all offenders or types of offenses. Caution is in order with respect to what "treatment" refers to in these cases. In many cases specifics as to what is available (the number and quality of personnel, the various professionals involved and the extent of their involvement) are not brought out in testimony. Waiver elicits the ambivalent foundation for much of the entire juvenile process since if the transfer is effected it is purely an extra-rehabilitative move. Clinically, youths who have committed a homicide and are waived may in fact have a better therapeutic prognosis than the more prevalent type of character disorder or subcultural delinquent who populate delinquency institutions. This, in turn, presumes that the types of professionals and institutions to carry out the treatment are available. Carrying of a waiver motion is a decision not based primarily on legal or treatment grounds, but rather on public clamor or the judgment of someone in the juvenile system of justice that the offense is sufficiently heinous to warrant certification. It is a conclusion that a youth cannot be rehabilitated by juvenile facilities, which is the question never put to the test. The conclusion is then made that there is no reason for exercising juvenile jurisdiction, since the juvenile is "unamenable" to treatment within the juvenile system, and the case is transferred to adult criminal court.

Waiver has a variability on the lower age limit at which a juvenile can be transferred. Public outcry after a sensational act, such as strangling a younger child, or some type of sexually deviant act, might result in a young child being remanded. A similar situation exists in states in which a juvenile court by statute has no jurisdiction over capital offenses, such as rape or murder. Again, this policy has little rationale or grounding on the basis of the behavior or by any treatment criteria. In Illinois, the decision to waive is solely up to the state's attorney and no hearing or standards are required. In fact, there are few printed norms for transfer utilized anywhere since the guiding criteria are rather in terms of a subjective set of factors which tally up to "not amenable." There is a direct implication for the treatment question present in the two main legal justifications offered for these waiver procedures. (1) The first is implicit in the discussion which utilizes a model holding that youths are screened out who are really not juvenile in "atti-

tude." This amounts to a naive version of a developmental approach in which there is a presumption that certain personality and behavioral norms which characterize someone older than the statutory limit are present in a given youth. The problem is that there is rarely an adequate evaluation to appraise this hypothesis, but a question-begging conclusion that a youth is in fact "overdeveloped" for his years and should be processed as an adult indicted for a criminal offense. (2) A second justification sometimes offered for waiver is to confront directly the inadequate treatment facilities available in a given community. The stress is then not on the "advanced criminal tendencies" but instead that a youth may not be treatable in any available institution within a jurisdiction, or "not treatable through currently existing facilities." In some cases these reasons are used in the same presumptive manner with no more than perfunctory evidence, but in others a groundwork has been laid by knowledge of the background of criminality or expert testimony regarding a given youth.

A variation of this situation is where the juvenile requests waiver on his own initiative. Several reasons might account for this. He might be convinced that he can present evidence in an adult court that will not result in a conviction, or he might prefer to take his chances on spending a limited amount of time incarcerated for a minor offense; in turn, he may only be fined. This would appear to be the reasoning observed in adolescent prostitutes, many of whom have learned their "tricks" while earlier institutionalized as delinquents. Since a majority of juvenile offenders have little desire for "rehabilitation," especially that which is offered by delinquency institutions, they opt for the technicality of the criminal law. This is especially so for older adolescents and negates many arguments about the stigmatization effects of criminal procedures having a deterrent effect on this group. Such maneuverings also belie much of the treatment goals promised in juvenile proceedings. While the limitations of their cognitive processes and impulsivity may predispose them to not desire to change their personalities or behaviors, we must also consider what is in reality being offered to them as rehabilitation. If the juvenile does not have a right to demand waiver, a further question is raised about rehabilitative goals. Giving the right to choose waiver is similar to giving an option to an acting-out patient to accept or reject treatment if it is offered. All varieties of testing, avoiding, and resistance become evident when treatment

is offered to these adolescents in the most optimal of treatment settings. It is therefore not surprising that the combination of their psycho-social problems and the frequent knowledge of inadequacies in juvenile institutions lead them to reject the juvenile process if they do not envision a long imprisonment. In effect, the juvenile who wishes to insist on his right to waiver is maintaining that he need not abandon his freedom under the 14th Amendment in return for what is being offered as correction or "treatment" as a juvenile. Until and unless the state can demonstrate that his conduct warrants such a potentially greater loss of liberty for the more minor offenses, he may prefer to take his chances on probation, a suspended sentence, fine, or an outright discharge for lack of sufficient evidence.

### **Behavioral Basis**

The subjective basis of the legal process with respect to juveniles is nowhere more clearly evident than in the behavioral basis as to what types of conduct will be viewed as indicating a need for institutionalization as a delinquent. This criterion is not the sole one, nor would some hold it to be the major one, and such exceptions as waiver procedures make this visible. Since removal from home and community, under the treatment rationale, is a major exercise of the police power of the state with punitive overtones, use of this power demands both cautious application and some indications of success from the procedure. One of the simplest behavioral criterion employed is the past record of the offender. This may be used in a simple quantitative fashion; add up the number of past offenses within a given time period and if it exceeds a certain number, as tempered by the gravity of the behavior, commit the youth. If all of the cases coming through juvenile court were surveyed over a projected time period this would probably be the most prevalent basis for delinquent commitment. In practice, this may be illustrated by such common juvenile offenses among males as car theft, riding in stolen automobiles, drinking intoxicating beverages, and simple assaults. Among adolescent females it would be seen in the ever-present incorrigibility, truancy, and promiscuity. The sequence is customarily that of an initial warning or informal probation, followed by formal probation, and then by a third offense at which time the question of removal is raised.

This does not reveal the subtle influences which are oper-

ating and determine whether or not detention will actually be carried out. A contrite attitude—the *mea culpa*—which is convincing to a judge, is often viewed as the hallmark of a rehabilitatable boy or girl. In contrast, the surly, passive-aggressive youth is viewed as a challenge to the authority structure of the court and society and such behaviors are taken as indicia of a need for rehabilitation, *viz.* a corectional facility. Note that the appraisal here is usually by externals of behavior and one could predict that the more clever and intelligent juvenile offender, who has a certain histrionic flair, will be able to present a more convincing *mea culpa*. There may be additional aid coming from pre-sentence reports from probation officers, and these must be evaluated on the basis of their own experience, talent, and case load numbers. Only in a small percent is a psychiatric appraisal at the judge's disposal before sentencing a juvenile and these are usually for the more serious offenses. Motives are then determined by externals, as described, or subjective appraisals. From the large numbers of juveniles caught up in this process, few can have a thorough appraisal. Further, recall that one-third of juvenile judges have no probation-social work staff available to them, and 80-90 percent have no available psychologist or psychiatrist (*In re Gault*, 1967; McRea, 1957).<sup>6</sup> Among the remaining 10-20 percent, few of the psychiatrists or psychologists have had training or expertise in work with children or family psychopathology, or more than a cursory experience with the types of problems facing juvenile courts and their limited dispositional options.

Other behavioral bases employed in practice evaluate the behavior in terms of offenses against property, against people, the social offensiveness of the behavior, its potential for recidivism, etc. The greater the evidence that a certain youth is an instigator, or using stolen property as a way of life or support, in contrast to his being a "follower," the more likelihood of his being assigned to an institution. Family and cultural variables may be injected as mitigating, such as attributing a boy's behavior to home influences, the presence of an alcoholic father, or a history of parental rejection. This type of confusion as the basis for delinquent behavior, coupled with inadequate evaluations, leads to mixed criteria as to who gets committed. Confusion is further compounded by using detention in an implicit manner as a punitive measure in some cases while in others the juvenile is evaluated by his personal and family psychopathology. In fact, once an acting-out juvenile is ap-

praised from the perspective of family psychodynamics, but he is "disposed of" by being remanded to a detention facility, not only is the feeling of resentment compounded but the same type of rehabilitative error is made which is seen in dealing with individuals addicted to drugs or alcohol. The individual is merely removed from a conflicted environment for a time, following which he is customarily and repetitively sent back to the same setting. At best he is given brief "dosages" of treatment based on whatever happens to be in use at a particular time in a given institution. This raises interesting questions such as whether a family unit could be ordered into a "family detention unit." The results of ordering parents into treatment as out-patients have had unreliable results, as most therapists would have predicted. Such coercive vehicles for treatment might suffice for a confinement period if organic therapies are to be applied, but they are fraught with uncertainties when the interpersonal context is viewed as crucial to the maintenance of antisocial behavior.

### **Dangerous Basis**

There is one area where the juvenile is either committed to a correctional institution, or waived to an adult criminal court, in which the basis for detention is very similar to that of adults. This is the case where the question of potential dangerousness or behavior which is threatening to others is present. A violent act may have been committed or its potentiality is suspected by someone, such as a probation officer, psychiatrist, or judge, in contact with the youth in the juvenile system. However, even in these cases, this controlling factor for incapacitation remains cloaked under references to treatment. All the unresolved questions that permeate detention of adults on a dangerousness basis are present with juveniles as well. These issues are raised with the mentally ill who are civilly committed, and in some states a special category of "mentally ill and dangerous" is present which serves to put such individuals in separate security institutions when a commitment takes place under this provision; the threat of dangerousness looms large with sexual psychopaths, as well as with release problems for those confined after a not-guilty-by-reason-of-insanity plea. Some individuals so classified are psychotic, while a great number are not but are rather plagued by severe character disturbances or have committed an episodic deviant act when in a regressed ego state.

The majority of detained juveniles are not psychotic but are rather varieties of character disorders or responding to subcultural influences. Issues concerning dangerousness become quite broad with juveniles, ranging from attempts to predict or forestall a major outburst of violence to preventing repetitive but more minor aggressions. This is not merely an attempt to determine which "emotionally disturbed" adolescents are dangerous, which is currently unresolved. It is an attempt to appraise the potential dangerousness of a heterogeneous group of delinquents who may have given indicia of certain aggressive behaviors or personality conflicts. Acknowledgment should be made that opinions about the mental state of an individual, and particularly his potential to act in a dangerous manner in the future, can be no better than clinical impressions. These types of decisions have to be made by courts which then carry the maximum degree of restraints. Types of clinical indicia that are routinely used to appraise dangerousness employ such factors as past overt assaultive behavior, a history of addiction and use of drugs, a history of impulse dyscontrol problems in which there have been outbursts of rage and fights, paranoid tendencies, sexual deviation, regressive object relationships, and a subcultural background which sanctions violence. Lack of reliability with respect to predicting future violence by these clinical criteria for a given individual is notable.

Efforts to devise more accurate predictive measures have limitations as well. There is no feasible manner of developing actuarial tables to predict dangerousness for those who are before the juvenile court, or waived to adult courts, since the court must make a decision with respect to discharging them right at the present time. To develop reliable tables would require that all of these individuals for a certain period, or a certain randomized number of them who are currently appraised as "potentially dangerous," be released for purposes of validating the predictive power of clinical impressions or inferences made from psychometric devices. Without this essential step, carried out for different types of offenses, personality, and social variables, we cannot know what the actual incidence of whatever type of dangerous behavior that is being predicted will be. This type of demonstration would be possible not only as to the reliability of specific clinical predictions, such as for a subsequent rape, for example, but also for clarification on where lines of dangerousness should be drawn. Although no judge or public is going to permit the release of large numbers

of these offenders for the purpose of developing valid base rates, without this procedure we are at best carrying out what the most skilled clinician can only call an "eye-ball" judgment. There would be added benefits if this knowledge was available. Say a group of adolescent rapists on a first offense were released and it was found that within two years 40 percent of them repeated a rape and another 20 percent had some other type of sexual offense. We would then have a base rate of one out of five or two out of five, assuming sufficiently large numbers and other statistically reliable procedures, who would be "dangerous" in terms of a specific predictive definition meaning that a certain type of behavior will be repeated within a given time. Decision-making by those in responsible judicial, administrative, and clinical positions would then have the capability of clarification on the basis of such data. However, say the decision was made on the basis of this type of data, to detain any first-time juvenile rapist. Of every hundred, we would be detaining 60 adolescents who appear unlikely to rape again and 40 who would not commit another sex offense. Whether this is a desirable or undesirable policy is something more appropriate for debate and revision when such bases for the decision are made explicit. At present, we have nothing close to this type of data available and efforts to detain or release for the multitudes of behaviors and problems are at best an expression based on the insights of clinical work. At worst, decisions to detain may be no better than a meaningless randomization based on personal guesswork.<sup>7</sup>

Nor would tables developed to predict the effectiveness of parole suffice. They are based on individuals who have been detained for some time, and are an invalid procedure to use as a basis for predicting dangerousness or behavior before one has been detained. Even if nothing more than a custodial stay has taken place, it is a different matter than predicting before such a decision has been made. If any type of treatment is carried out, the same restriction holds since this does not permit us to develop base rates for recurrence of a given set of behaviors which are first assembled and called dangerous for some purpose. If we are talking about major acts of violence, such as aggravated assault or homicide, it should be noted that these are events with a low probability and it is often impossible to improve on the clinical base rates. There is thus a lack of both base rates and reliable psychometric tools. What results is the utilization of dangerousness appraisals by one or

more people—usually based on the past occurrence of a certain act. But to continue to detain one in the future by predicated dangerousness from a past act is closer to penal policy than a rehabilitative one. The ultimate decision should be based on the degree of social risk which society and the courts are willing to take. Hopefully, specific knowledge should be available for making such policy choices in a rational manner.

Another inconsistency in the use of the dangerousness criterion is that use of a determinate prison sentence for those in an adult prison does not employ concepts of dangerousness to prevent the release of a detained person. Such individuals may be discharged and have a far greater potential to commit antisocial behavior than many of the emotionally conflicted or culturally damaged juveniles who engage in sundry acts of delinquency. We may actually have more valid bases for making predictive statements about the potential dangerousness of those already detained although they may be inaccurately used or not at all. Further, recall that retaining juveniles primarily on the basis of their being viewed as dangerous again places a penal goal ahead of a rehabilitative one. To retain a juvenile solely, or primarily, because of an alleged or suspected social dangerousness, without specifying that he is treatable and that such treatment is available for him, would be hard to justify under the stated goals of the juvenile court.

### **RIGHT AND ADEQUACY OF TREATMENT ISSUES**

It is not universally accepted that delinquents are in need of "treatment," especially if by this there are suggestions of a medical model of diagnosis and treatment. The subvarieties of treatment approaches vary from rehabilitative efforts, focused on broad-based environmental exposures within an institution, to "resocialization" experiences. The former point to the benefits of being removed from a noxious social environment, such as a slum or disorganized family, and being placed in an institution free from such noxious influences. This comes close to being equivalent to "custodial treatments" in state hospitals for the mentally ill in which an emphasis is placed on the values of a neutral environment. These approaches raise several questions for the treater as well as issues related to involuntary confinement on this basis if the environment and others in it are viewed as the chief culprits. Justification for such involuntary detentions, the follow-up results available, the lumping of sundry types of diagnostic problems and ages, the length of

stay, and the effect of removing the juvenile for a period while the noxious environment to which he will return usually remains constant, are questions which need answering.

These same questions are relevant when more specific socialization measures are introduced to accompany a period of removal. Much variation can occur under the rubric of socialization. It may include group experiences such as physical work programs (forestry camps and athletics) and varieties of group interaction from sensitivity training to group therapies. In addition, other treatment approaches may be utilized depending on what institution is involved, what personnel are available, and at what particular time it is being appraised. Programs based on behavior modification techniques may be utilized by having juveniles earn points or their symbolic equivalents in the form of colored tokens, by good behavior; the tokens may then be used to purchase certain objects or to get passes for temporary leaves or earlier discharge. Another program may place an emphasis on the need for remedial educational techniques from the cognizance of the high rate of educational disability present in most committed delinquent youths. Yet another program may stress attempts to "guide" or "counsel" the youth from his wayward ways. There may be direct utilization of efforts to inculcate respect for authority by focusing on disciplinary techniques. This is not referring to physical brutality, which is a danger that can occur in any institutionalized setting, but rather the planned utilization for restriction of privileges, isolation in his room, or loss of visitation privileges for violation of institutional rules.

"Guided group interaction" focuses on the attitudes and norms maintained by a group of delinquents rather than the behavior or attitudes of any one individual (McCorkle, *et al.*, 1968). The theoretical assumption of this approach is that the abnormality of the delinquent resides in a peer group which supports his deviancy; hence, the assumption that dealing with the values of the peer group as a unit will change behavior. This assumption would seem a valid underpinning for the type of subcultural delinquent or gang type of delinquent who has been described (Cohen, 1955; Cloward and Ohlin, 1960; Miller, 1966; Empey, 1967). The approach would seem to have little impact on juveniles responding to familial, interpersonal, or internalized conflicts. A variant employs the delinquent himself as a therapist for his fellow delinquents. This is a utilization of role theory by holding a position that youth will learn

conventional ways of behaving by acting out conventional roles with their concomitant duties (Cressey, 1955; Burgess and Akers, 1966). This approach is similar to such self-help groups as Alcoholics Anonymous and Synanon for alcoholics and drug addicts, except that we must keep in mind the differences when it is used in a confined setting with committed juveniles. Another difference is that a juvenile may not be given the choice to accept or reject the proffered treatment. The Presidential Committee on Law Enforcement and Administration of Justice (1967) pointed out that authorities in correctional services for juveniles agree on two major principles: (1) traditional forms of incarceration in correctional institutions should be avoided as far as possible, and (2) alternatives must be sufficiently broad and diversified to provide for a wide range of treatment situations and procedures geared to the requirements of different types of delinquents (Wheeler, *et al.*, 1967). In practice, these are rarely met.

Such institutions, it is believed, are of dubious value as rehabilitative mechanisms, especially with the inadequate staffing and facilities found in most of them. . . . Not only is this form of treatment potentially damaging to the subjects, but the cost of such standard correctional approaches is much greater than that associated with most of the alternatives to incarceration. (Wheeler, *et al.*, 1967: 422).

After these cogent points, the Task Force concluded, "It seems the better part of both wisdom and justice to use institutional confinement only for those who would be dangerous to the community without it." The result is that we are thus brought back to the unresolved determination of dangerousness to justify confinement for juveniles. Hence, the continuing importance and the need for further explication of standards regarding dangerousness from their present lack of validations.

Any cursory survey of rehabilitative approaches reveals wide variations in the assumed basis for what gives origin to and maintains delinquent behavior. This varies from focus on the psychodynamics of an individual delinquent, family behavior patterns, as well as accepting the causal role of broader socio-cultural influences. It is not necessarily true that workers in institutions are clear on what their views are, but rather that they implicitly hold to and operate by some view. Institutions with approaches focused on individual psychodynamics and family psychopathology exist, but they are rare and usually alien to a majority of correctional approaches in use. Part of this is due to the absence of sufficient numbers of personnel

with psychodynamic training and sophistication who can participate in the operational network of delinquent institutions. In this sense, the situation is not much different from that in many other state institutions, such as state hospitals where civilly committed individuals are detained. An added difference with delinquents is that the organic therapies have shown even fewer results with them and hence they have had less benefit from the psychopharmacological approaches which have aided the overworked state hospitals. Apart from outbursts of rage and anger during confinement, drug therapies seem to have little use with delinquents except for "putting the lid on."

Another point concerns personnel. Reformatory approaches with delinquents have never emphasized the need for adequate diagnostic appraisal in terms of psychiatric nosology in either a descriptive or psychodynamic sense. The result has been that individuals institutionalized via delinquency hearings have been a heterogeneous group. In practice, the position has been to screen out, or offer hospital commitment, for those who are considered mentally ill. "Mentally ill" in this context usually refers to those who are manifesting overt psychotic symptoms. The more compensated cases of psychosis, or those subject to periodic psychotic episodes, are most frequently processed as delinquents, just as adults with these limitations are processed as criminals. If regressive behavior or outbursts occur, they are handled by sedation or a temporary transfer to a hospital and a subsequent retransfer back to the correctional facility. In reality, a great mixture of personality disorders and "neurotic character" problems are present in delinquent youths. The whole gamut of family psychopathology is similarly present. Keep in mind the limitations of skilled personnel at the juvenile court processing and adjudicatory level as well. The same limitation on expertise holds for institutions in which the predominant number of those working with delinquents are referred to as counselors or aides. Their training is rarely beyond the undergraduate level, and many such positions are filled by college students. Current emphasis on the use of volunteers as treaters extends this approach. In some situations this is because more skilled personnel is not available, but in others it is based on the belief that no special qualifications are really necessary for treating many delinquents.<sup>8</sup> Knowledge of the approaches and programs being utilized in specific localities and institutions would be necessary to know what type of treatment or rehabilitation is being offered. Without this, any ap-

praisal of a right to treatment and its adequacy with respect to the involuntary detention of juveniles can only deal with abstractions.

### **Conditions for a Therapeutic Alliance**

To offer anyone psychological treatment under conditions of involuntary confinement raises complex issues. *Legal* questions with respect to what is done to an individual under the Eighth Amendment's "cruel and unusual punishment" provisions, deprivation of liberty, invasion of privacy, interference with the right to be left alone, indeterminate confinement as violative of due process, and questions of statutory and constitutional interpretation concerning the basis for detaining a juvenile for rehabilitation are all germane. *Therapeutic* questions can be raised regarding the efficacy of treatment approaches carried out under these conditions with the exception for the rare juvenile who senses such a need and its justification. These limitations would hold for any approach short of the coercive administration of an organic therapy to an unwilling patient, such as by holding a person down and giving him a tranquilizer or barbiturate injection or administering electroconvulsive treatments. If the juvenile does not wish to explore with his therapist, peer group, or other professionals such things as his reactions to his past environment and family, or his internal responses and conflicts, a question must be raised as to the success of individual and milieu efforts which are so undertaken. This does not mean that an overwhelming acceptance of institutional placement by a disturbed adolescent must be present, without ambivalence or negative therapeutic reactions, if treatment is to be undertaken. These are an accompaniment of many therapeutic processes in medicine, psychiatry, and human relation situations. It does mean that, in the absence of a professional collaborative arrangement to deal with conflicting wishes and feelings, with a goal towards their eventual resolution, little more is present than "serving time." From the perspective of the community, this amounts to a form of "preventive detention" to delay or postpone the opportunity for carrying out further antisocial behavior. A fundamental principle is involved therapeutically in these procedures. One does not become a patient merely by living in an institution either voluntarily or involuntarily.

Duration of confinement under a rehabilitative framework for a juvenile delinquent is much in need of exploration. This

particularly is so with indeterminate sentencing approaches and the possibility of continued jurisdiction and confinement until age twenty-one. It has been noted that the greatest impact from an institutional placement may be accomplished during the first few weeks or months of a stay and conceivably only within the first few days.<sup>9</sup> Those who advocate longer stays should have the burden of proof to justify it as serving greater social ends, or achieving more therapeutic gains, than could be accomplished by shorter stays. Common sense, as well as therapeutic wisdom, are in support of time limits on confinement if the actual goal is treatment.

Arguments that commitment of a juvenile delinquent, like an adult criminal, really carries no right of treatment but only the freedom of an institution to offer it, reveals the blatant penal character of detention at any age. Penal detention *per se* assuredly carries no overt treatment requirements, but to acknowledge this openly for juveniles committed under a civil procedure would openly acknowledge that treatment is a sometime thing, offered at the whim of institutional personnel. Although this may be the situation, few would be willing to have it "spread clearly upon the record." To make this process more visible would be one further step in divesting the juvenile process of the duplicity and dishonesty which has characterized some of its practices.<sup>10</sup>

Open acknowledgment of diverse goals by detention would mean that rehabilitation as a goal for *all* juvenile delinquents would be abandoned. Those for whom the rehabilitative ideal is abandoned would need the protections of the criminal law if it was felt that institutionalization was required. It would be hoped that at least an initial screening would detect those for whom a treatment arrangement was deemed desirable as well as feasible. For the subgroup in which the question of "dangerousness" arises, there may be a need for special procedures directed to this issue. Great flexibility in therapeutic programs would be needed if they are to be meaningful for experimentation and as adjuncts for the use of educational and social rehabilitation models. There may also be a need to take risks attendant upon shifts to part-time release or out-patient facilities. Again, the limitation is present in the quantitative and qualitative deficiencies in the triage of follow-up facilities with accompanying research to give rationality and confirmation or disconfirmation to judgments that are made as to when and where different approaches should be selected.

## VARIATIONS ON A THEME OF REHABILITATION

What are the general programs and techniques encompassed under the rehabilitative model for juvenile delinquents? Semantic and substantive issues are often used to avoid distinguishing between the two of them. When the word "rehabilitation" is used in various statutes and judicial opinions dealing with juveniles, is it really meant to be taken seriously, or is it rather a generic phrase used to justify whatever happens to be transpiring in a particular setting? Is rehabilitation being used in the sense of attempts to reconstruct as deformed or deviant the personality of a juvenile offender, the family psychopathology, as well as whatever socio-cultural influences, which have contributed to a final end-process which has led a juvenile to be adjudicated delinquent and remanded to an institution? By these broad criteria rehabilitative goals are rarely achieved. It has been argued that they are not achievable from the radicalness of the solutions that would be required for their achievement.

At the other extreme, some argue that the term "rehabilitation" was never meant to be taken literally. It was rather a euphemistic phrase expressing the fond hope of certain socially-minded reformers. Hence, it was never meant to be used as a criterion to evaluate what is done to juveniles "placed" in institutions in terms of meeting a standard of treatment. Goals of placement are then put in terms similar to the rhetoric of the reformers at the turn of the century and beyond, to provide more humane detention facilities for minors, to keep them segregated from adult criminals, and to give them "moral guidance."<sup>11</sup> If this is so, the rehabilitative position is placed on the level of an elective procedure and not made the primary basis for detention. However, this is rarely specified in clear terms, and there is rather continued reiteration that the legal basis for involuntarily holding a juvenile under a civil commitment is to accomplish his rehabilitation.

A further pressing question is if "rehabilitation" should be taken as equivalent to "treatment." Immediately, a problem is encountered which is not entirely solved by the use of a dictionary or linguistic analysis. One of the primary ambiguities in this regard has been the confusion and outright disagreement attendant upon the nature of delinquency and the myriad remedies proposed for dealing with the delinquent. This confusion extends into institutional approaches used with confined

delinquents. Since definitions of delinquency do not necessarily correspond to criminal conduct, the result is a further mixture of social judgment, moral condemnation, sociological theorizing, and psychiatric opinion. Delinquency has been defined in different jurisdictions to involve such diverse behaviors as absenteeism, truancy, incorrigibility, sexual practices carried on routinely in our adult society, in addition to the ever-present property offenses, and varieties of aggressive behavior. Such a heterogeneous grouping raises questions as to the validity of the delinquency grouping as well as treating these disparate groups as fungible. Further complications are the variations between jurisdictions, as well as inconsistencies on the dispositional level, providing an idiosyncratic emphasis to juvenile detention rationalized by references to individualized justice.

Attempts to clarify the nature and remedy for delinquency raises perplexing questions similar to those about the nature of mental illness. These involve questions relevant to the criteria used for mental illness, and if the majority of behavior classified as delinquent is generically quite different than categories of mental illness. While some advocate abandonment of all references to mental illness, even within the field of psychiatry, others feel that this type of word game does not resolve the substantive issues.

Use of cluster of symptoms and signs being present can be taken as an index of disturbance being present, although some would go beyond this and use such criteria as a lack of well-being, underachievement, or a lack of a creative life as indicia of conflict and hence a potential for personal and social difficulties. With respect to delinquency, confinement amounts to selecting a group which has usually passed through several stages of a screening process, such as past efforts to deal with the juvenile in the community, adjudication of delinquency, decisions to by-pass probation, or other facilities of a clinical or community nature. A decision to confine has excluded these options. At that point, a further process of selection should take place, which rarely occurs. This involves screening out different varieties of infractions, having adequate diagnostic appraisals available on which to make rational "treatment" recommendations and prognostic statements, segregation of those considered recidivistic, recalcitrant, aggressive, or potentially dangerous. However, to do this raises further problems about current inadequacies, theoretically and practically, to make valid statements about these groups.

Nor can efforts towards providing reception and diagnostic centers be thought of as solving the problem. They are plagued by the same shortages of staff and lack of expertise as other facilities involved in delinquency problems. Further confusion about the nature of delinquency operates in these centers as well. Specific delineations of symptoms, personality structure, and family psychopathology, are not the primary orientation in delinquency institutions. Their orientation is closer to the broader welfare viewpoint applied to deviant delinquents or "problem youth" who are involved in a variety of personal, family, and social predicaments and viewed in need of some type of assistance. This view does not emphasize an act-focused approach but rather emphasizes the actor — a distinction rooted in modern positivistic criminology in contrast to classical criminology.<sup>12</sup> Rehabilitation is then not conceived as primarily dealing with infractions by juveniles. In theory, it urges that the overall personality be dealt with instead of the act. In practice, the personality is rarely dealt with but rather the focus embodies environmental alternations or broad community action programs.<sup>13</sup> It is basically a sophistication of the Dickensian model that living with thieves makes thieves—a dyssocial model of delinquency. The result is a confused potpourri of techniques utilized in various institutions under the guiding theme of rehabilitation. The looseness of such approaches permits almost any activity that is carried out to be referred to as rehabilitation, if not "treatment." Effectiveness of such procedures can rarely be determined. An attendant vagueness permeates questions raised in a legal context about the right and adequacy of treatment for juvenile delinquents caught up in this maze of social theorizing. Issues are similar to those raised when adults are detained involuntarily on some basis in which "rehabilitation" may not even be the primary justification given for confinement (*Rouse v. Cameron*, 1966).<sup>14</sup>

Along with this confusion there is the correctional atmosphere itself which raises questions about therapeutic efficacy. If this is actually antithetical to a treatment situation can be debated pro and con. A vagueness permeates correctional institutions as to their goals beyond "curing delinquents." Goals have been variously expressed as stopping delinquency without reference to personal and family concomitants while in other institutions the overall remodeling of an individual is held to be the goal. An emphasis on institutionalization itself as reha-

bilitative—the transference of the custodial or warehousing model to the correctional scene—is stressed by some. In other institutions, there may be a direct acknowledgment that their mission is to protect the public, which is why disruptive youths are in their custody. If there is an attempt to stress specific techniques of rehabilitation, all varieties are possible, although in practice a few predominate. Predominant among the techniques are group activities or participation, or some variety of educational measures. Work programs may be “make-work” in the sense of forest reclamation, on the basis that the adolescent has “too much energy to burn up,” or these may be connected with educational measures to give the delinquent some type of job proficiency. In each of these approaches, there is some type of vague but implicit assumption about the etiology of delinquency, such as lack of vocational skills or educational deficit, which, via a chain of events, is believed to have led a youth to become a school dropout and subsequently a delinquent, etc. This is not to be interpreted as saying that most personnel working in correctional institutions have thought out a particular theory of delinquency, but rather that their practices are connected in a tenuous manner to some theory.

Nor can the issue of pain-infliction as a “reformatory device” be ignored. This is based on the assumption that punishment reforms. Pain infliction then becomes the selected therapeutic technique. This may vary from naive disciplinary methods to more sophisticated techniques of operant conditioning to “reshape” the juvenile.<sup>15</sup> In general terms, the process of juvenile adjudication, as well as coercively maintaining residence in a delinquency institution, is a *de facto* punitive measure. It is meant to be on the theory that transgressions should not be rewarded. It is precisely in this area that confusion reigns, since the path is then open to utilizing punitive measures as treatment. Attempts to distinguish penal from treatment approaches then break down. Taken more specifically, the argument would hold that antisocial behavior should not be “rewarded” by placement in a setting that is pleasant and gratifying since this would reinforce such acts. As in all other approaches to delinquency, there are implicit theories of delinquency in such treatment approaches. Aversive reinforcement by painful stimuli, deprivation of certain freedoms, food, visitations, or goods, may be used in attempts to “program” behavior. Positive reinforcement approaches in the form of rewards of working for privileges are used, as well as obtaining tokens which can be used

to purchase privileges, such as passes. Perhaps the most widely used form of aversive reinforcement or deprivation in the criminal law is the device of taking money from a transgressor in the form of a fine. In these approaches, as in most others, there have unfortunately been major methodological defects with juveniles from different socio-economic backgrounds, intellectual and educational variations, mixing of juveniles with different offenses, absence of adequate control groups, and little long-term follow-up even in such crude terms as recommitment, let alone their functioning outside an institutional placement.

Lack of clarification of the general goals of reform schools for juvenile delinquents raises further problems in the evaluation of treatment programs. Like any other institution in which there are involuntary inmates, such as via civil commitment to mental hospitals or to security hospitals for the criminally insane, there is a function of incapacitation of the "deviant." A troublesome individual is removed from society and at least one contribution towards greater harmony in society is made. Further, if such individuals are removed, the rate of delinquency should theoretically decrease. Figures which indicate this does not occur can always be handled by arguments that social and political conditions have become more delinquency-promoting, or that social organizations are deteriorating and offsetting rehabilitative measures. The deterrent effect is also stressed by some with the same unanswered arguments as for deterrence with adults. We do not have convincing evidence that specific deterrence operates with a single delinquent, nor that general deterrence operates with juveniles who do not deviate, are not apprehended, or not committed as delinquents.<sup>16</sup> As noted, using the term "treatment" in the context of administering punishment has a further consequence of promoting ambiguity as to just what treatment is. Almost anything then becomes justifiable from the lack of clear visibility as to what treatment in delinquency institutions may entail. Psychiatry and psychology at this time do not have validated answers as to the role of punishment in affecting behavior. It is a very complex scientific question where results, even from the laboratory, are conflicting, and more so when transposable to life with all of its unpredictable events.<sup>17</sup>

It is perhaps evidence that maintenance of such ambiguity on the end of the process is functional. There are many reasons for maintaining such a state of affairs and various groups wish

to keep it so. A large sector of the official and unofficial public deal with their own value systems and conflicts via the correctional systems for which deviant adolescents present the greatest challenge. To contain a host of conflicting values and demands, correctional programs are a prime example of pluralism in action. In this context, both punitive and non-punitive measures, attempts at individual treatment versus recreational and physical fitness programs, strict disciplinary measures versus permissiveness, vocational programs versus outdoor work, may all be encompassed within different correctional settings with varying emphases. What is called treatment is a microcosm of the conflicting values and needs of the general populace directed against a conspicuously deviant sector. Nor can the assignment of moral culpability to the delinquent be ignored. While there are many who argue that the delinquent is "sick" — a product of his impulses or environment — an assessment of culpability is actually an inherent part of the public process and occupies a good deal of the time in juvenile procedure. In practice, this is noted in the heavy moral overtones in much of juvenile court procedure with an expectation of a *mea culpa* in the adolescent.

Such pluralism gives the public reassurance that "bad kids" are being isolated from the community so that they and their children are being protected while they are simultaneously told that the setting is a benevolent one in which the best interests of juveniles are primarily kept in mind by rehabilitation processes.<sup>18</sup> Nor is the main problem solely the lack of personnel in purely numerical terms or the more serious lack in terms of expertise in view of divided opinion on who may be the best "treaters" of all. Again, since there can be argument as to what treatment amounts to with delinquents, and in institutional settings, viewing treatment proposals as serving other functions seems justified. These functions may be a rationalization of the conflicts here under discussion to assure the maintenance of sameness, or they may be a covert expression of hostility via the advocacy of a "treatment" measure which often amounts to degradation.<sup>19</sup> These are "givens" in such situations in which an interesting question is the persistence of deficiencies. That the deficiencies do not seem to substantively alter should raise questions about the sincerity of the wish to provide adequate treatment, and the limitations of rational thought processes alone to deal with such problems.<sup>20</sup> Some have gone further and note that there is a need not to disrupt the stability in-

herent in any bureaucracy which employs thousands of individuals and gives them not only a salary, but a feeling of actually doing something worthwhile. This varies from the lowest menial employee to the highest administrator, as well as scholars who can continue to write articles alluding to the "inconclusive" evidence (such as this one). All of these individuals and agencies have their needs to preserve continuity and to assure themselves on some level that no major change will occur.<sup>21</sup>

Are there criteria to be used in appraising if a certain type of human relationship should actually be considered therapy? It should be noted that in practice the actual situation is far removed from such standards. For thousands of youths who are confined within institutions of the type now existing, statistically few will have a treatment approach based on an adequate assessment of their individual conflicts and family psychopathology.<sup>22</sup> In part this is from personnel shortages, but just as prevalent is a position that such approaches are unnecessary. The result is to reinforce a position that it is not a series of conflicts within the delinquent and his family that has been played out, past and present, in a process of mutual interaction within a peer group and social setting. Rather, the emphasis is placed on attributing delinquent etiology to someone or something else. This facilitates a feeling that the juvenile has been wronged by others, and permits him to continue to reiterate how his delinquent behavior is not really his fault, but due to the way he was treated by his parents, schools, sub-cultural group, and society. Endless and fruitless discussions are fomented on the need for the world to change if the delinquency problem is to be solved. For the individual delinquent, this permits a perpetuation of a pattern of projective attack of repeatedly challenging others and "the system," who are theoretically assigned fault. Yet, as noted elsewhere, the system somehow does assign fault to the individual delinquent. It does this under a pretense of rehabilitation, but there is little cognitive or emotional doubt in the delinquent who is adjudicated and committed that someone is pointing a finger at him and assigning blame. The result is that little change in the community — often referred to as the inherent stability of social institutions — takes place, since they have assessed fault as residing with the delinquent juvenile by neutralizing him from his environment. At the same time the delinquent is given permission to continue blaming the unchanging environment and

to ignore his compulsive addiction to self-destructive and maladaptive solutions in his life style. This type of antagonism in many cases continues to be played out within the institutional setting where challenges to authority versus submission and conformity permeate much of the daily atmosphere and goes on.

To accept a policy of autonomy regarding personal therapeutic involvement for an institutionalized delinquent would have the value of eliminating pretense. For individuals who choose not to engage in treatment, the pretense of their justification for confinement being treatment is removed. This would force a direct confrontation of the issue of whether detention itself should be considered therapeutic. Rehabilitative arguments on the benefits from experiences of institutionalization itself, the adult model available for identification, and the rehabilitative effects of punishment, deprivation, or denial — true representations of the Puritan ethic in action with respect to the delinquent — would then become subject to closer scrutiny as treatment measures. If no therapeutic pretense about continued detention of the juvenile is made, alternative legal and jurisprudential models may be presented. To continue to use a penal model in a context in which the justification is rehabilitative raises provocative questions. It raises squarely the question of whether the institution and process are penal where punishment and deterrence are the unacknowledged justifications. Preventive detention practices with juveniles would also require reconsideration. Hence, there is need for a determination of the length of stay in such settings, and procedures for release of individual youths who may be repetitively acting out their destructive impulses against neutral observers in their home environment.

In practice, length of detention is determined by several factors extraneous to any rehabilitative model idea. Many of the same factors governing commitment of the delinquent to an institution govern the length of his stay, such as the seriousness of the offense. An assaultive offense would be considered more indicative of someone who should stay institutionalized longer than a case of repetitive truancy. Note the operational similarity in this respect to the ratings of seriousness in adult courts and proportional sentences and the focus on the act rather than the actor. Other factors that get considered are the numbers of times a youth has been at an institution previously, his manner of "coming around," which customarily refers to

his conformity to the disciplinary rules of the institution by not presenting challenges to the authority of the personnel. Since authority problems are why a large number of the youths are committed to begin with, a strong emphasis on conformity as equivalent to cure is present. If the more enterprising and manipulative youths are able to contain themselves, or even show a semblance of external conformity, they are more likely to be released. Another conspicuous factor that operates in the continuation of detention is the mundane consideration of the pressure of new admissions. Greater numbers committed per year promotes a drop in the mean length of stay. Efforts to coordinate institutional discharge with the beginning and end of school terms, as well as the coming and going of institutional personnel, also influence discharge timing.

Age of the juvenile influences the length of stay and the approaches utilized. An older youth, especially if there have been several return commitments to the institution, is most likely to be classified as recalcitrant and in need of stricter discipline. Hence, he may be assigned to types of work details, again with the nonvisible assumption that the self-discipline required to accomplish a work task will generalize to his behavior once out of the institution. There is little supportive evidence for this assumption. The actual composition of a population of confined delinquent youths may vary widely, although the programs in use at a given institution usually do not. Somewhere in the dispositional process the few overt, psychotic juveniles, who are engaging in antisocial conduct, are usually screened out and either committed to mental hospitals or sent to clinics. By this process, a logical fallacy is propagated that the emotionally disturbed have then been screened out. This again reflects a type of unsophisticated thinking regarding personality development and its deviations. It is mentioned in this context to note that if perchance a youth with "bizarre" symptomatology ends up committed to a delinquency institution, he will most likely be discharged somewhere else—either to his home with the recommendation that he get help, with or without the help of some after-care agent, or directly transferred to a residential treatment center or hospital, if available. The possibility of transfer to an institution with stricter discipline for a boy who is particularly disruptive or aggressive looms in the background. This again directly approaches the penal model. There is also the matter of "administrative transfers" in which a youth can actually be transferred to a penal insti-

tution.<sup>23</sup> Word games are played to the hilt in these situations in which the reasoning takes the form that no constitutional infringement of rights under due process, equal protection, or cruel and unusual punishment, has occurred since a juvenile in a prison is not viewed as a prisoner. Therefore how can it be considered that he is being punished.<sup>24</sup>

### DETENTION AND RELEASE

Once institutionalized, there is little recourse for a juvenile delinquent apart from such traditional as *habeas corpus*. Since the detention was supposedly in his best interests and for treatment, *habeas corpus* would require documentation of some major errors of fact. Some states may provide for the child, parents, or friends, to make a motion requesting that a modification or revocation of the disposition take place (Villanova Law Review, 1967). Rejection may then be appealed. In most cases this hinges on the ability to show a change in the circumstances which lead to the detention. Two types of dilemmas occur. If the alleged change is supposed to have taken place in the delinquent himself, the evidence for this must be forthcoming from the staff of the institution where a juvenile is detained and release being sought. It would be a very rare instance in which a private psychiatrist or psychologist would be retained by a family to evaluate if a juvenile in a delinquency institution should be released. If a juvenile delinquent is entitled to this independent evaluation by an extension of right to counsel reasoning raises an interesting question for the future. Even when an independent appraisal occurs, the argument is offered that such an *ad hoc* evaluation has not had the benefit of observing the youth in the given institutional setting. The other horn of the dilemma in seeking release of a detained juvenile is to argue that the environment from which the boy became a delinquent has now changed sufficiently so that he may safely return to it. This leads to various ploys, such as parental protestations of reform, promises to discipline the child, motions of relatives to obtain custody and offer a new home, etc. Any attempt to appraise the significance of such changes quickly leads to a realization of the lack of substance involved in most of them.<sup>25</sup>

### THE TREATMENT POSITION: MEANINGFULNESS

The main problem associated with the rehabilitative approach resides not only in the acknowledged difficulty of delivering on the rehabilitative promise, but in the concealment

inherent in a position which fails to distinguish a hope from a promise, or a possibility from one capable of actual attainment, and which continues to exercise jurisdiction under a guise. A court which was designed, and could function, not to correct criminals but to help a child would not be viewed as one in which the child was in need of constitutional protection by such measures as due process guarantees present in criminal procedures. In fact, there would be nothing inconsistent in actively seeking out children beyond the ken of those who merely had committed overt delinquencies. They could be offered the same humane services of institutions and personnel who were helping children who had violated civil rules or ordinances, as well as treating any behavior considered undesirable in a juvenile. It is precisely by the use of such language that confusion has resulted. For if incorrigibility, truancy, swearing, wearing long hair, and smoking—marijuana and otherwise—reflect behaviors adults do not like on some basis at a particular historical moment, the juvenile process in effect shifts from attempting to remedy psychopathology in children and families to enforcing parental dictates via the *parens patriae* power of the state. Even if intervention was limited to acts that are criminal for adults, the approach is largely one of bypassing the psychopathological elements that give rise to the behavior.

It is this attempt to enforce certain social, moral, and institutional needs on a child, beyond criminal statutes, that has permitted the use of delinquency adjudications for a host of challenges to parental authority, such as not attending school or obeying school personnel. The juvenile challenges to authority may be overt or covert, literal or vicarious, direct or symbolic, but on some level the adults get the challenge. There is a carry-over implicit in the "solution" of court and institutional intervention that children can be, and should be, made to obey parents, treat adults with respect, go to school, and be industrious. This by-passes much of what we know about behavior being based on mutual respect and integrity within family units as well as in extended social units. These approaches do not seek the source of such deviations as determined by various possibilities of conflict on some level which may have achieved added reinforcement and promotion in certain subcultural groups. Detecting these conflicts and subtleties presents a challenge to the most competent of clinicians who attempt to diagnose and treat children and families with psycho-

logical and social disabilities. A basic assumption operates regarding solutions for behavior in most delinquency institutions and in the juvenile process which appears to be in conflict with a dynamic-developmental approach to human behavior. The latter raises questions about psychological or social deviancy in contexts of disturbed development within individuals and families. In many ways the rehabilitative efforts appear to be a nostalgic remnant of the Victorian ethic of child submissiveness to parental discipline. The difference is that it is not overtly called this, but rather rehabilitation of a delinquent. Further, this type of socialization model appears to have altered drastically for adolescents since the inception of the juvenile process at the end of the Victorian era.

Nor should any equivocation be present about the primacy of the concern of the court in the elimination of disruptive influences. Basically, the same criteria apply to a juvenile as to an adult who poses a threat to the integrity and safety of the community.<sup>26</sup> Acknowledgment of this primacy would have the beneficial result of eliminating duplicity for the juvenile as well as within the institutional framework. Procedures would be viewed as coercive and applied to conduct which was not merely viewed as resistant to socialization, but for which the police power of the state should be called upon to restrict as with any other citizen. It is of interest that this was the original model laid down for the juvenile court in Illinois. However, by a process of accretion subsequent legislatures continued to add new juvenile violations.<sup>27</sup> Restricting the coercive sanction to conduct where a specific infraction of criminal statutes has occurred would have additional surplus benefits. It would eliminate some cases that are being sent to institutions, and avoid the adverse consequences contingent upon solidifying an anti-social identity in the juvenile.<sup>28</sup> It may thus function to affect some individual juveniles favorably in a preventive manner.

What about the "right to treatment" of the institutionalized delinquent who is being held? Does it make any sense to continue to talk of his being held under a justification for "rehabilitation"? As the word is now bandied about with respect to those detained, the procedures called rehabilitation can amount to almost anything. No one can say what treatment should or does amount to in such a situation since any procedure may be designated as rehabilitative. Indeed, this places the delinquent in an even worse situation than those who are civilly

committed. For the latter group there are at least some criteria in which questions of justification can be raised and tested (Note, Harvard Law Review, 1966; Aronowitz, 1967; Livermore, *et al.*, 1968). For those civilly committed, criteria are used to justify an involuntary commitment. This may be if treatment is one of the goals and if it can be met. But rehabilitation admits of no such argument or measurement. Rehabilitation is rather a goal for which there are at best fond hopes of attainment. In fact, it would appear that the main justification for using the word "rehabilitation" is to detain an individual since without this justification detention might be unconstitutional from the glaring penal nature of the provision.<sup>29</sup> Hence, confinement has to be rationalized on the basis of the juveniles' sacrificing other protections in exchange for treatment.

### CONCLUSIONS

It seems unavoidable to conclude that a right to treatment for juvenile delinquents is a correlative of their detention, based on a civil commitment process. Appraisal of treatment adequacy is even more difficult than with other groups involuntarily detained, such as those committed as mentally ill. One reason for this difficulty is the lack of a consistent and widely accepted model to explain "delinquency," and the diverse behaviors lumped together as delinquency. Although various theories regarding etiology and treatment exist for mental illness, there is more consensus on what should be done as treatment even if it may not be available. With delinquents, no treatment approaches show any consistent degree of effectiveness—beyond the process of aging. Although some challenge the position that treatment is the *quid pro quo* for detaining a juvenile, this appears increasingly difficult to defend. This is in view of recent court cases spelling out details, such as the number of staff and need for an individualized treatment plan for each patient, in the civil commitment area (*Wyatt v. Stickney*, 1971).

At an adjudicative and dispositional level, the special procedures for processing juveniles without the protection of the criminal process can only be justified in terms of making special treatment available. No specification of what adequate treatment amounts to for delinquents is usually given. The relative lack of psychiatric personnel in corrections negates any attempt to apply even the vague standards for treatment used for those civilly committed. The problem is the lack of stand-

ards that can be used to scrutinize validity of treatment measures used. Not to do so permits the wide license that confinement permits in interference with the liberties of juveniles under what are essentially false promises.

Another conclusion is the absence of enforced standards for expertise in treatment facilities for those functioning as treaters. This is one criterion to challenge what is called treatment and its adequacy since the deficiencies are overt and classifiable. This does not refer only to the vast number of unfilled positions. A challenge also involves sanctioning the use of personnel who are largely untrained and unskilled to carry out the treatment. Some programs amount to the equivalent of custodial maintenance, while others offer naive interventions which have little justification as treatment when the price is involuntary detention. Nor can this give more than a temporary reassurance to society based on incapacitating an individual. The burden should be placed on institutions who detain people to demonstrate what they are doing in the name of treatment. If this cannot be done, the penal character of the confinement is disclosed for debate.

The question is then if a rationalization called "treatment" is needed? Is it wise and equitable—as well as serving more preventive goals in the long-run—to acknowledge that treatment is not the justification for detention? This would undoubtedly require an appraisal of the basis of detention along statutory or constitutional grounds. The blurring of the civil-penal distinction is the basic issue which raises fundamental questions about the nature of detention.<sup>30</sup>

Juveniles who are deemed in need of incapacitation from society need to be handled like other individuals who raise such challenges. The juvenile process, if restricted to criminal offenses, could deal with these juveniles on the basis of confronting them with such an offense, and if necessary using a correctional institution with the same hope as with an adult offender, i.e., that it may have some rehabilitative or deterrent effect on his behavior. This is not to argue for sending juveniles to institutions which are more overtly punitive. It is rather to tighten the procedures by which juveniles are institutionalized so that fewer of them would meet this fate. For those who do, effort and vigilance are still needed so that they are dealt with hopefully in a humane and therapeutic manner. However, absent the staff, funds, and know-how to accomplish

this, we must be wary of continuing to use the rationalization of treatment when it is inaccurate.

Allegations of dangerousness with juvenile offenders raise the same perplexing and unresolved problems as with adults alleged to be dangerous.<sup>31</sup> These require great clinical skill to assess the relevant factors involving past behavior and potential. This presents problems of both a predictive and clinical nature. It can be briefly stated that the predictive capacity of clinicians are limited as well as those of statistical measures, from the lack of accurate base rates on which to make valid predictions.

The implications are that detention of juveniles is based on providing treatments which have either been nonexistent or nonvalidated. Where certain treatment measures might have prevailed, they are often not available. A "right to treatment" is hard to negate legally for confined delinquents unless one wishes to specify that the phrase should be merely thought of as a rhetorical device or something expressing fond hopes rather than results. Our knowledge of rehabilitating delinquents may be seen as so meager that we are utilizing various techniques on a trial and error basis. This means that delinquents are *de facto* experimentees and should be seen in this light. The same humane considerations should apply to them as to experimentees used in any investigations when procedures, methodology, and results are indecisive. Considerations pertaining to the use of human volunteers should then be respected. For these delinquents who have committed legal offenses where it appears a given therapeutic approach is likely to have a fair chance of success, this should be available with the qualified individuals to carry it out. If this is not available, some other criteria are needed to determine the ethics and legality of detention which is a justifiable issue.<sup>32</sup>

What about the frequently resorted to argument that treatment is the "best we can do with what we have"? This is precisely the issue warranting inquiry. Attempts to deny a treatment right, or justify existing institutional approaches as adequate, are unjustified. A just and optimal solution would significantly restrict those involved in the entire juvenile process — from pre-court contacts on to levels of adjudication and disposition. A major constriction of those committed to juvenile institutions would be part of this. There will still be some judged as requiring removal from the community. Alternative

pathways to detain an individual until he is deemed safe to return to the community are needed. Some will receive treatment if and when it is available and a therapist relationship to the juvenile becomes actualized. One persistent danger is the use of opinions to predict that an individual will commit a dangerous act in the absence of clear and uncontrovertible opinion in this regard. With our present limitations it is desirable to limit restraint to those whose aggressive acting-out behavior seems imminent and continuing. When this is done, it amounts to an abandonment of the rehabilitative justification for detention of juveniles. Detention in delinquency institutions is then confined to the commission of restricted criminal acts and when no feasible alternative dispositions for those assessed as responsive to certain types of treatment are available by competent professionals, the solution lies in traditional approaches with more funds and staff made available.

For the more elusive and recalcitrant cases, two changes are needed: (1) Limit confinement to a far smaller number of juveniles. This would amount to confinement of a group that would largely be composed of juveniles assessed as dangerous. The exact basis for this judgment would need to be given. (2) To get out of the current morass of what is euphemistically called "treatment," the smaller number who are detained should be viewed in the manner of an experimental group. The system of justice would gain by these changes in making visible what is actually attainable and what is not attainable for certain offenders. Hence standards to be applied in different cases and jurisdictions can be delineated rather than hiding behind the rehabilitative argument. This will make visible those cases where the maximum amount of our therapeutic armamentarium at this time is insufficient. This is a reaffirmation of the treatment principle in terms of a belief in treatment being applied to high threshold groups to develop criteria that are subject to appraisal.

When dealing with something as precious as the liberty of a person — whatever his age — we do well to go beyond a naive notion of science. This naivety takes almost any type of change in behavior as confirmation of whatever treatment measure is used. Strict formulations of what is called treatment are needed along with predictions of outcome. The more risks that can be taken, in the sense of predicting the outcome of more ambiguous cases, the more confirmable will our treatment approaches become. This means that approaches used should be capable of

being tested and subject to refutation if results are not forthcoming. A theory which is not refutable by any conceivable outcome is actually a metatheory—hardly a basis for detention. Irrefutability—in contrast to what some believe—is not a virtue but actually a vice which can cloak all manner of subterfuge.

### CASES

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*Rouse v. Cameron*, 373 F.2d 451 (1966)  
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